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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 445

BROOKLYN SAVINGS BANK, Petitioner.

v.

WILLIAM J. O'NEIL, Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MAX R. SIMON,
Counsel for Respondent.

NATHAN W. MATH,
JAMES L. GOLDWATER,
of Counsel.

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BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Opinions Below

The Municipal Court of the City of New York, Borough of Manhattan, First District, dismissed the complaint without opinion after trial without a jury. The unanimous opinion of the Supreme Court of the State of New York, Appellate Term, reversing and directing judgment in favor of plaintiff, is reported in 180 Misc. 542 (R. 79-80). The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, further affirming, appears in 267 App. Div. 317 (R. 90-102). The Court of Appeals of the State of New York handed down its unanimous affirmance on June 14, 1944. The per curiam affirmance, which indicates the questions passed upon, appears in 293 N. Y. 666.

Jurisdiction

The Court of Appeals of the State of New York—which is the highest court of the State in which a decision in the suit could be had—issued its remittitur on June 14, 1944 (R. 105). The final judgment of the Municipal Court of the City of New York, after filing of the remittitur, was entered on August 17, 1944 (R. 110). The petition for writ of certiorari was filed on September 8, 1944. Petitioner invokes jurisdiction of this Court under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

Petitioner has not, in its petition for writ of certiorari, specified a question with regard to whether respondent was an employee "engaged in commerce or in the production of goods for commerce." On the contrary, it has been conceded that petitioner does not ask this Court to determine the question of coverage (Petition for Writ, p. 5).

The questions presented, therefore, are:

1. Did appellant violate the Act in failing to pay respondent the overtime wages prescribed in Section 7 at the time when earned in the regular course of his employment?
2. Did restitution of the unpaid overtime several years after it was due preclude an action to recover liquidated damages based upon the underpayment?
3. Did the execution by respondent of a general release upon receiving his accrued unpaid overtime long after it was earned bar recovery of liquidated damages?

4. Does the imposition of liquidated damages, under the circumstances, deprive petitioner of property in violation of the Fifth Amendment to the Constitution of the United States?

The applicable statutory provisions are Sections 7 and 16 (b) of the Fair Labor Standards Act (52 Stat. 1060; 29 U. S. C. § 201 *et seq.*) set forth in an appendix to the petition for writ of certiorari (Petition for Writ, pp. 20-21).

Statement

Respondent was employed by petitioner as a night watchman at its commercial building, located in the City of New York, from October 24, 1938, the date when the Fair Labor Standards Act went into effect, to August 30, 1940 (R. 19). He brought this action under Section 16 (b) of the Act to recover the sum of $432.16 as liquidated damages resulting from the petitioner's retention for several years of an equal amount which respondent concededly earned as overtime under Section 7 of the Act during the period of his employ.

On June 1, 1942 this Court, in *Kirschbaum* v. *Walling*, 316 U. S. 517, held subject to the overtime provisions of the Fair Labor Standards Act night watchmen, such as respondent, employed in guarding against fire and theft commercial buildings housing tenants producing goods for interstate commerce. On June 8, 1942 this Court, in *Overnight Motor Transport Co.* v. *Missel*, 316 U. S. 572, held that an employer who has violated the overtime provisions of the act automatically becomes liable for "an additional equal amount as liquidated damages" under Section 16 (b) regardless of his good faith or alleged inability to determine that the Act applied, in view of the mandatory character of the statutory language. Thereafter, in Novem-

ber of 1942, long after plaintiff's employment had terminated, and long after the overtime compensation in question had been earned, petitioner paid respondent the sum of $423.16 concededly earned as overtime under the Act during the period he was employed (R. 23-25). At the time of making this payment, without advising respondent of its then existing liability for liquidated damages under Section 16 (b) of the Act, petitioner obtained from respondent a release "from any and all claims, debts, damages or liabilities arising out of or in connection with his claims of any kind or character whatsoever growing out of his overtime employment" (R. 11-12, 54-55, 65-66).

On February 16, 1943 this suit was instituted to recover the unpaid liquidated damages. Respondent's right to recover has heretofore been affirmatively upheld upon three different appeals; upon each appeal the issues of fact and law, including the question whether plaintiff was an employee "engaged in the production of goods for commerce", together with all of the arguments presented at this time in support of the application for a writ, have been resolved against petitioner and in favor of respondent.

At least two statements in the petitioner's summary of the case in its petition require comment. It is said that "the tenants in the building here involved" were "not engaged in the production of goods" (Petition for Writ, p. 4); and further, that the case involves "the validity of accord and satisfaction" (Petition for Writ, p. 5). Petitioner's own failure to raise here the issue of whether the Act applied to respondent belies the first contention; further, both the assignment of questions presented in the petition and the certification of questions passed upon in the per curiam affirmance of the New York Court of Appeals and the remittitur clearly indicates the absence of any issue of accord and satisfaction.

ARGUMENT

I.

There is here no novel, substantial or important question of construction of a Federal Statute not heretofore determined by this court, nor did the Court of Appeals of the State of New York decide this case in conflict with applicable decisions of this court.

Petitioner must be denied certiorari in view of the fact that the decision of the Court of Appeals of New York was in accord with the previous decisions of this Court and involved no novel, substantial or important question not heretofore determined here. See *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572, holding payment of liquidated damages to be "mandatory", given coverage under the Act and neglect or refusal to pay overtime in accordance with the Act's requirements, "regardless of the good faith of the employer or the reasonableness of its attitude." As Mr. Justice Reed stated there, "'perplexing as petitioner's problem may have been; the difficulty does not warrant shifting the burden to the employee * * * the retention of a workman's pay may result in damages too obscure and difficult of proof or estimate other than by liquidated damages * * * nor can it be said that the exaction is violative of due process." There, as here, petitioner had pointed out that "if there was a failure to pay the statutory overtime, it resulted from an inability to determine whether the employee was covered by the Act."

Nor does the incidence of a release here upon the making of what was in effect a partial payment of the entire sum due alter the result. This Court has many times held

that employees may not bargain away, waive or release the right to receive the full sums to which are entitled under mandatory provisions of remedial legislation establishing for their protection minimum wage and hour standards, enacted in the public interest. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379; *U. S.* v. *Morley Construction Co.*, 98 F. (2d) 781 (C. C. A. 2), cert. den, sub. nom *Maryland Casualty Co.* v. *U. S.*, 305 U. S. 651. This principle was only recently reaffirmed by this Court in *Midstate Horticultural Co.* v. *Pennsylvania R. R. Co.*,——U. S.——, 88 L. Ed. 83, where occasion was taken to point to the fact that "strong equitable considerations which, in relation to other types of legislation not so permeated with provisions and policies for protecting the general public interest" might move towards lending a forum to petitioner's plea of release, waiver or estoppel, may not avail against the rigid requirements of a statute designed for "securing the general public interest".

II.

This case was decided in complete harmony with applicable decisions of the various circuit courts of appeals and the highest state courts.

There is no divergence of authority in the various circuit courts of appeals and in the highest courts of other states upon the questions passed upon here by the Court of Appeals of New York. The decision of the latter court was, in fact, in keeping with innumerable authoritative decisions of various circuit court of appeals and highest state courts.

A. On failure to pay overtime required under the Act at the time when earned in the regular course of employment, the employer immediately became liable to the employee in double the amount of the underpayment, and voluntary payment of the overtime years after it became due could not preclude recovery of liquidated damages.

Examination of the language of Section 16 (b)* of the Act, upon which this cause is founded, together with the interpretation of the Administrator of the Wage and Hour Division, charged with the Act's enforcement, and the decisions of the courts, compels the conclusion that the employer, upon failing to pay overtime required by Section 7 of the Act at the time when earned, in the regular course of employment, immediately became liable to the employee in double the amount of the underpayment.*

Liquidated damages are clearly an integral part of the employee's right and the employer's concomitant liability, and not merely an appendage to assertion of the remedy. *Abroe* v. *Lindsay Bros. Co.*, 211 Minn. 136, 300 N. W. 457 (Sup. Ct. Min.). This result is indicated by the Administrator's interpretation of he Act's requirements. In Interpretative Bulletin No. 4, the Administrator states his opinion that "the Act takes a single workweek as its standard" and that "overtime compensation due an employee must be paid in cash and normally at the time of the regular pay period and may not be accumulated to be paid at any time subsequent thereto." See paragraph 29 of Interpretative Bulletin No. 4, Wage and Hour Manual, 1942 Edition, p. 111. And see Section 196 of the New York State Labor Law which requires that "every person

* "Any employer who violates * * * shall be liable to the employee or employees affected in the amount of * * * unpaid overtime compensation * * * and in an additional equal amount as liquidated damages."

carrying on a business * * * shall pay weekly to each employee the wages earned".

Accordingly, the only reasonable construction of Section 16 (b) is that it creates a cause of action in double the amount of unpaid compensation immediately upon failure of an employer to pay overtime as required by Section 7 contemporaneously when earned, at the end of the current pay period. That this construction is the proper interpretation of the congressional intention is indicated by the great unanimity with which the highest courts, both state and Federal, have accepted it. *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572; see also *Emerson* v. *Mary Lincoln Candies*, 173 Misc. 531, 174 Misc. 353, aff'd 261 A. D. 879, aff'd 287 N. Y. 577 (Ct. App., N. Y.); *Abroe* v. *Lindsay Bros. Co.* 211 Minn. 136, 300 N. W. 457 (Sup. Ct. Minn.).

Five different Circuit Courts of Appeals have recently indicated that Section 7 is violated, and a cause of action in double the amount of the underpayment accrues to the employee, immediately upon the employer's failure, even in good faith, to pay the required overtime currently, at the time when earned in the regular course of employment; and post-payment of the past-due overtime leaves the employee with a right of action to recover the liquidated damages still remaining unpaid. *Geo. Lawley & Son Corp.* v. *South*, 140 F. (2d) 439 (C. C. A. 1, 1944), cert. den. U. S. , May 11, 1944 (No. 908, Oct. 1943 Term); *Rigopoulos* v. *Kervan*, 140 F. (2d) 506 (C. C. A. 2, 1943); *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4, 1943); *Birbalis* v. *Cuneo Printing Industries*, 140 F. (2d) 826 (C. C. A. 7, 1944); *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. (2d) 359 (C. C. A. 10, 1943), cert. den. 320 U. S. 772.

B. Considerations of paramount public policy dictate that an employee may not bargain away his right to recover any part of the sums due him under the Fair Labor Standards Act.

It has long been recognized that employees may not bargain away, waive, release or compromise the right to receive the full sums to which they are entitled under the mandatory provisions of remedial, social legislation enacted for their protection in the public interest. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379; *U. S.* v. *Morley Construction Co.*, 98 F. (2d) 781 (C. C. A. 2), cert. den. sub. nom. *Maryland Casualty Co* v. *U. S.*, 305 U. S. 651; *Larsen* v. *Rice*, 171 Pac. 1037 (Wash.); *City of Glendale* v. *Coquat*, 52 Pac. (2d) 1178 (Ariz.); *Montague's Adm'r.* v. *Massey*, 76 Va. 307; *Kehn* v. *State of New York*, 93 N. Y. 291; *Wright* v. *State*, 223 N. Y. 44; *Clark* v. *State*, 142 N. Y. 101; *Pitt* v. *Board of Ed.*, 216 N. Y. 304; *McMahon* v. *Mayor*, 22 A. D. 114. (N. Y. Sup. Ct.-App. Div.).*

There can be no question of the remedial and humanitarian character of the Fair Labor Standards Act and the fact that it is pregnant with the public interest. See *Section 2 of the Act* and *U. S.* v. *Darby Lumber Co.*, 312 U. S. 100 (1941); *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local No. 123*, 321 U. S. 590 (1944). The same principle, therefore, has been regularly applied in cases involving the Fair Labor Standards Act and the courts have repeatedly struck down as inconsistent with the public interest agreements by employees to accept less than the full amounts which the Act gave them the statutory right to demand, as due them under the statute's mandate.

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* It is fundamental that a waiver or release of protective rights which is inconsistent with the public policy which the legislative act manifests is no less invalid because the enactment involved contains no expressed prohibition against the waiver of the statute's benefits. *Crowe* v. *Liquid Carbolic Co.*, 208 N. Y. 396; *Wood* v. *Horgan*, 291 N. Y. 422.

Fleming v. *Warshawsky & Co.*, 123 F. (2d) 622 (C. C. A. 7, 1941; *Birbalis* v. *Cuneo Printing Industries, Inc.*, 140 F. (2d) 826 (C. C. A. 7, 1944); *Johnson* v. *Dierks Lumber Co.*, 130 F. (2d) 115 (C. C. A. 8, 1942); *Carleton Screw Products* v. *Fleming*, 126 F. (2d) 539, 541 (C. C. A. 8, 1942); *Rigopoulos* v. *Kervan*, 47 F. Supp. 576 (S. D. N. Y., 1943), aff'd 140 F. (2d) 506 (C. C. A. 2, 1943); *Cudahy Packing Co. of Ala.* v. *Bazanos*, 159 So. (2d) 720 (Sup. Ct. Ala. 1943); *Fiedler* v. *Potter*, 172 S. W. (2d) 1007 (Sup. Ct. Tenn., 1943). A multitude of lower court decisions, both Federal and state, have recognized the soundness of this rule, as applied to the Fair Labor Standards Act.*

Nor may it properly be urged that there is a conflict between decisions of the circuits on this point. *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4, 1943), relied upon by petitioners as indicating such conflict, involved the question of an accord and satisfaction based upon a settlement or compromise of a purported dispute as to whether the Act applied. This case involved no such dispute, nor was there here any kind of settlement or compromise, but merely a voluntary part payment by petitioner of less than the full amount mandatorily due respondent under the Act. The plea of accord and satisfaction, settlement, or compromise of a genuine or bona fide dispute has neither been pleaded nor proved. The answer at bar merely pleads naked release or waiver by the employee in consideration of receiving payment of his back overtime (R.

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* *Hutchinson* v. *Barry*, 44 F. Supp. 829 (D. Minn., 1942); *Wilkinson* v. *Noland*, 40 F. Supp. 1009 (E. D. Va., 1941); *Travis* v. *Ray*, 41 F. Supp. 6 (E. D. Ky., 1941); *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn., 1943); *Campbell* v. *Mandel Auto Parts*, 31 N. Y. Supp. (2d) 656 (N. Y. Sup. Ct., 1942), aff'd, 264 A. D. 701 (N. Y. Sup. Ct. App. Div.); *Schneider* v. *Sports Vogue*, 35 N. Y. Supp. (2d) 431 (N. Y. Sup. Ct. 1942); *Rubin* v. *Meadow Provisions Co.*, 39 N. Y. Supp. (2d) 517-518 (N. Y. City Ct.).

9) and, furthermore, it is conceded that the payment of the back overtime was voluntarily made, before controversy, and without even a demand (R. 23, 24, 25; Petition for Writ, p. 4).

There being no divergence in the decisions of the circuits upon this point, nor in the highest appellate tribunals of the various states where the question has been reviewed, certiorari should be denied.*

III.

All constitutional questions invoked by petitioner have already been passed upon by this Court.

Petitioner has urged, as a ground for the granting of certiorari, that the imposition of the mandatory liability for liquidated damages upon violation, where there was difficulty in determining applicability of the Act, is violative of the due process clause of the Fifth Amendment to the Federal Constitution. This precise point has already been passed upon here, and rejected by this Court. See *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572. See also *U. S.* v. *Darby Lumber Co.*, 312 U. S. 100 (1941); *Kirschbaum* v. *Walling*, 316 U. S. 517 (1942).

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* The New York State Court of Appeals, in rejecting as invalid a purported release or waiver of benefits under a somewhat similar remedial, public policy enactment, observed in *Wood* v. *Horgan*, 291 N. Y. 426: "We may not give judicial sanction to means designed to evade the legislative will. * * * Believing as we do, that the enactment * * * was prompted by considerations of public policy, it is not within the function of the judicial process to weaken the protective measure which the legislators chose to adopt."

IV.

This court has already refused to grant a writ in a similar case despite similar arguments.

In the case of *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. (2d) 359 (C. C. A. 10, 1943), the Tenth Circuit Court of Appeals held, as at bar, that voluntary restitution of the back overtime did not discharge or release an employer from the mandatory liability for liquidated damages. This Court refused an application for a writ of certiorari in 320 U. S. 772 (Oct. 18, 1943). The grounds urged as a basis for the granting of a writ were identical, in every respect, to the grounds here urged. (See application of petitioner and brief of *amicus curiae* for writ of certiorari in No. 222, October Term, 1943.)

CONCLUSION

No adequate reason is set forth in the petition for the granting of a writ of certiorari and application therefor should be denied.

Respectfully submitted,

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